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Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty

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PLAGIARISM AND LEGAL SCHOLARSHIP IN THE AGE OF INFORMATION SHARING: THE NEED FOR INTELLECTUAL HONESTY*

Carol M. Bast** & Linda B. Samuels***

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Those engaged in legal scholarship should strive for intellectual honesty and avoid plagiarism, but what exactly is required? This Article explores plagiarism from the perspective of professors, judges, and practicing attorneys and discusses topics such as reuse of one's own previously published writing, authorship, and the difference between plagiarism and copyright infringement.

Legal scholarship should be based on intellectual honesty. With writing, intellectual dishonesty is avoided by the courtesy of citing to authority, accurately identifying authorship, and acknowledging those

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who contributed to the final product. Conversely, a writer who does not cite to the original author risks being unprofessional, giving offense, and being labeled a plagiarist.

Whether instances of plagiarism are on the rise cannot be known with certainty; however, some experts believe that plagiarism is increasing.¹ This may reflect a greater interest in ethical issues by the media and business,² or it may instead reflect the improved ease of detecting plagiarism³ and disseminating the news of its discovery.⁴ Certainly, both unintentional and intentional plagiarism may be exacerbated by the ease with which writers can copy and paste digital information into another document⁵ and, perhaps, by the fact that all copies look original.⁶

Over the last few years, with improved access to research materials on the Internet, much of it free of charge, the mindset that information can be freely borrowed for republication has become commonplace in

1. Karoun Demirjian, *What is the price of plagiarism?*, CHRISTIAN SCI. MONITOR, May 11, 2006, at 14. One author suggests that because professors regard ethical violations as less serious than they did in the past, such incidences may be on the rise. Philip J. Langlais, *Ethics for the Next Generation*, CHRON. HIGHER EDUC. (Wash, D.C.), Jan. 13, 2006, at B11.

2. See, e.g., Lisa Takeuchi Cullen, *Rule No. 1: Don't Copy*, TIME, May 15, 2006, at 41 (discussing William Swanson, CEO of Raytheon, who plagiarized part of his acclaimed book of management maxims); see also *infra* note 66.

3. For example, the same company that developed Turnitin to detect student plagiarism, Turnitin, <http://www.turnitin.com/static/plagiarism.html> (last visited Mar. 21, 2008), also markets iThenticate to "publishers, corporations, law firms, and others" to allow them to identify plagiarism. iThenticate, <http://www.ithenticate.com> (last visited Mar. 21, 2008). iThenticate searches the Internet and some proprietary databases, such as ABI/Inform, Periodical Abstracts, and Business Dateline. iThenticate—Plagiarism Detection, <http://www.ithenticate.com/static/features.html> (last visited Mar. 21, 2008). iThenticate does not currently search Westlaw or LexisNexis. Thus, iThenticate may not be comprehensive enough at this time to detect all instances of plagiarism of published works, though it may have that capability in the future.

4. Judge Richard A. Posner suggests that a journalist's exposure of a plagiarist has an element of self interest. Exposing plagiarism may influence the reader to believe in the trustworthiness of the journalist who has spent the requisite time to ferret out the offending passages. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 76 (2007) ("Both [journalists and historians] hope by taking a hard line against plagiarism and fabrication to reassure the public that their practitioners are serious diggers after truth whose efforts, a form of 'sweat equity,' deserve protection against copycats.").

5. There is no doubt that today's ease of information sharing has made copying more accessible. Donald McCabe, who has authored a number of articles on plagiarism in education, blames the increase on the ease of online copying. See Demirjian, *supra* note 1. McCabe's research shows that fifty-eight percent of high school students admitted to plagiarizing within the last year. *Id.* Another study found that forty percent of undergraduates copy and paste online sources. Ben Arnoldy, *Students Sue Company for Fights to Their Homework*, CHRISTIAN SCI. MONITOR, Apr. 10, 2007, at 1.

6. When materials are downloaded and then edited, the new version often looks as finished as the original, rather than clearly appearing as a marked-up, edited work.

society. As a result, authors need to be concerned with protecting their work from being plagiarized.⁷ Conversely, those whose work may have crossed the line into plagiarism or who are in a gray area⁸ should be aware of the possibilities for detection and should take steps to protect themselves against allegations of plagiarism.⁹

Most practicing and academic lawyers would readily agree that those engaged in legal scholarship should strive for intellectual honesty and avoid plagiarism. However, there is justifiable confusion over the application of this seemingly simple principle. Varying plagiarism standards exist depending on the role of the legal writer and the type of document produced. This Article will explore the application of plagiarism standards in the context of the work of professors, judges, and practicing attorneys and their respective legal writings. The Article also will consider some special circumstances that arise, such as reuse of one's own previously published writing, and student and legal clerk authorship. The authors provide a definition of plagiarism as a starting point and encourage the various types of legal writers to clearly define acceptable and unacceptable practices. In addition, because of the prevalence of plagiarism, the authors recommend that universities, law reviews, journals, and publishers adopt a policy requiring that manuscripts be electronically scanned for plagiarism prior to submission or prior to review.

7. Although not the focus of this Article, copying can also infringe a copyright. See discussion *infra* Part I.E. A fairly new option for a digital author is to offer a Creative Commons license in the digital writing. There are a number of different types of Creative Commons licenses, each allowing certain use of the digital writing in exchange for the user crediting the author. For additional information on Creative Commons licenses, see Creative Commons, <http://creativecommons.org> (last visited Mar. 21, 2008).

8. Gray areas include activities such as republishing, see *infra* Part I.C; naming authors and contributors, see *infra* Part I.D; and the plagiarism standard for teaching materials, judicial opinions, and transactional documents, see discussion *infra* Parts II.A-C.

9. Evidence of plagiarism among professors, attorneys, and judges is largely anecdotal. These professionals would be understandably reluctant to reveal that they had plagiarized; professors would be even more reluctant to admit plagiarizing from student work. Thus, any reported percentages could be expected to be much lower than the actual rate at which plagiarism is occurring. The authors have not located any estimate of the amount of plagiarism committed by legal scholars. See Ellen Schrecker, Book Review, *ACADEME ONLINE* (Sept.-Oct. 2005), available at <http://www.aaup.org/AAUP/pubsres/academe/2005/SO/BR/schr.htm> ("We do not know, perhaps cannot know, whether the incidence of academic fraud has increased over the past few years."); Susan Llewelyn Leach, *Profs Who Plagiarize: How Often?*, *CHRISTIAN SCI. MONITOR*, Apr. 27, 2005, at 15 ("Even if faculty plagiarism is not measurably on the rise – numbers are so hard to come by that it is hard to gauge whether it is – the attention aroused by the recent headlines, coupled with the emergence of antiplagiarism software, has resulted in far more scrutiny of academic research.").

I. PLAGIARISM: DEFINITIONS AND SCOPE

A. Definitions of Plagiarism

The term “plagiarism” comes from the Latin word “plagiarius,” meaning a kidnapper.¹⁰ The first known use of the term dates back to the first century A.D. when the poet Martial reportedly employed the term to criticize a fellow poet who used Martial’s poetry as if it were his own.¹¹ Today, while there is general agreement as to what is meant by plagiarism, there is no standard definition of the term.¹² The many contemporary definitions of plagiarism vary, but most share the concept that plagiarists misappropriate another’s words as their own without acknowledging the contribution or source.¹³ One major distinction among the definitions is whether the plagiarist should be sanctioned only if the plagiarism was intentional.¹⁴ In addition, some definitions protect ideas and information as well as words.¹⁵ The following discussion reviews similarities and differences among several definitions of plagiarism.

The Legal Writing Institute (LWI), an organization of professors who teach legal writing at law schools, developed a definition of plagiarism for the training of law students and published a plagiarism policy available for adoption by law schools. The LWI defines plagiarism as “[t]aking the literary property of another, passing it off as one’s own

10. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 170 (2002).

11. *Id.* at 177; Ellen Gamerman, *Legalized ‘Cheating,’* WALL ST. J., Jan. 21-22, 2006, at P1.

12. See David A. Thomas, *How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic*, 2004 BYU EDUC. & L.J. 421, 422 (noting three common dictionary definitions of plagiarism, but arguing that these basic definitions are inadequate).

13. See, e.g., POSNER, *supra* note 4, at 11 (explaining that plagiarism is commonly thought of as “literary theft”); Green, *supra* note 10, at 173 (using the word “stealing” to describe plagiarism); Thomas, *supra* note 12, at 422 (noting that plagiarism denotes wrongful appropriation or theft of another’s ideas as one’s own); see also *infra* notes 31-41, 134-35 and accompanying text (describing self-plagiarism as borrowing from one’s own prior publication without acknowledgement).

14. See, e.g., Green, *supra* note 10, at 181 (noting significant confusion about whether plagiarism requires a mental element); Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 73-74 (2008) (indicating that no clear consensus exists as to whether plagiarism requires some level of mental culpability such as intent or negligence); Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War Against Student Plagiarism*, 2007 BYU EDUC. & L.J. 119, 120 (“Plagiarism is composed of both intentional and unintentional acts that fail to give credit to the original source.”).

15. See, e.g., POSNER, *supra* note 4, at 11; Green, *supra* note 10, at 173.

without appropriate attribution, and reaping from its use any benefit from an academic institution.”¹⁶ The LWI created the policy after a committee found law school plagiarism definitions and sanctions “inconsistent” and “contradictory.”¹⁷ The policy explains the instances in which authority must be acknowledged, contains exercises testing the reader’s ability to identify whether the writer has avoided plagiarism, and provides hypothetical situations involving potential plagiarism for class discussion.¹⁸ Because legal writing classes will introduce many law school students to the LWI’s plagiarism definition, the definition will likely become influential in the profession. The definition includes both unintentional and intentional plagiarism; however, because it is restricted to “literary property,” it does not encompass the use of another’s spoken words or ideas.¹⁹

In contrast, Judge Richard A. Posner defines plagiarism as “nonconsensual fraudulent copying.”²⁰ The plagiarist is misrepresenting himself as the original author, thereby conferring upon himself an undeserved benefit.²¹ Both Judge Posner’s definition and the LWI definition are concerned with the plagiarist receiving a benefit. But, Judge Posner’s definition is much more restrictive because “fraudulent” conduct requires intent to deceive or at least recklessness by the plagiarist and would not include inadvertent or innocent instances of copying.²² Judge Posner further limits his definition of plagiarism to the use of passages from an author without the author’s consent. In his view, plagiarism is one subset of intellectual fraud, while consensual fraudulent copying is another subset exclusive of plagiarism.²³ Therefore, under a definition of plagiarism requiring “nonconsensual fraudulent copying,” a professor who copies from a student, a judge who copies from an attorney, and a partner who copies from an associate, with her express or implied consent, have been intellectually dishonest or intellectually fraudulent, but have not engaged in plagiarism.²⁴ Taking this one step

16. LEGAL WRITING INST., LAW SCHOOL PLAGIARISM V. PROPER ATTRIBUTION 2 (2003), available at <http://www.lwionline.org/publications/plagiarism/policy.pdf>.

17. *Id.*

18. *See id.* at 3-12.

19. *See id.* at 2.

20. POSNER, *supra* note 4, at 33 (internal quotation marks omitted) (noting also that plagiarism is only one type of intellectual fraud).

21. *See id.* at 19-20 (discussing that an effective plagiarist induces a reader to believe the work is his).

22. *See id.* at 17 (“Concealment is at the heart of plagiarism.”).

23. *Id.* at 33.

24. *See id.* at 21-23. Posner distinguishes between law clerks, whose tasks include preparing initial drafts of judicial opinions, and professors’ research assistants. *Id.* at 23. The law clerk has consented to ghostwriting for the judge by taking the clerkship position,

further, a student who copies from another student by using a recycled term paper, or who purchases a paper over the Internet, would not be plagiarizing as long as the original author or party with “rights” to the paper consents. Thus, Judge Posner’s definition is decidedly narrower than what is usually thought of as plagiarism in an academic setting.

There are many other definitions of plagiarism, some of which require intent to misappropriate another’s words and some of which extend beyond words to ideas. For example, one definition of plagiarism offered by student commentator Laurie Stearns is “intentionally taking the literary property of another without attribution and passing it off as one’s own, having failed to add anything of value to the copied material and having reaped from its use an unearned benefit.”²⁵ Seemingly, this definition would permit reuse without attribution if the new writer made some kind of change that adds value. One problem, of course, is deciding what change is just a paraphrase and what adds value. Further, why should making a change, even if it adds something, obviate the need for attribution? Other definitions, such as that of Harvard University, do not require intent and are therefore more comprehensive as to the mental states that would qualify the writer as a plagiarist. Harvard defines plagiarism as “passing off a source’s information, ideas, or words as your own by omitting to acknowledge that source—an act of lying, cheating, and stealing.”²⁶ This definition is much more basic and encompassing, as it omits any requirement of receiving a benefit. Further, it covers “words,” “information,” and “ideas” that might not be included under the narrower “literary property” concept used by LWI and Stearns.²⁷ This raises the bar for attribution considerably.

The following is a summary table of the plagiarism elements gleaned from the definitions discussed:

but it may not be clear whether the professor’s research assistant has consented to the professor copying his writing. *Id.* (“Law clerks are hired on the clear understanding that they are writing for and in the name of their judge. This tends not to be the explicit understanding in the case of student research assistants. The research they do clearly belongs to the professor, but not their words.”).

25. Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513, 516-17 (1992) (footnote omitted).

26. GORDON HARVEY, *WRITING WITH SOURCES* 22 (1998). This manual is used in the expository writing program at Harvard University. See Harvard Expository Writing Program, Writing Resources, <http://isites.harvard.edu/icb/icb.do?keyword=k24101&tabgroupid=icb.tabgroup35038> (last visited Mar. 21, 2008).

27. Stearns, *supra* note 25, at 516-17.

Differing and Common Elements Found in Selected Plagiarism Definitions

	LWI	Posner	Stearns	Harvard
Taking	X	X	X	
Literary property	X		X	
Without attribution	X		X	X
Benefit	X		X	
Copying		X		
Fraud/intent		X	X	
Nonconsensual		X		
Without adding value			X	
Words, information, ideas				X
Lying, cheating, stealing				X

B. Unintentional Plagiarism

The question of intent is particularly important because when allegations of plagiarism are made, the accused usually claims inadvertence or lack of intent. In many instances, unintentional plagiarism may be difficult to separate from intentional plagiarism. Although intentional copying and pasting of passages from another's writing without using quotation marks or crediting the original author does occur, oftentimes the explanation is that the copying was unintentional. While undoubtedly true in some instances, claiming that the plagiarism was unintentional rather than intentional may be suspect because it is self-serving. It is almost commonplace for authors accused of plagiarism to claim that the borrowed words were from notes taken when reading an original work and that the author thought they were original.²⁸ In a variation of this "defense," the writer may assert that he incorporated copied passages into a manuscript with the intent to either provide quotation marks and attribution later or revise the language and provide attribution. Sometimes, professors and authors rely on the notes of an assistant who failed to indicate that portions were copied from the original sources. Others claim that they wrote what they believed were original words and ideas, not realizing that the words and ideas were remembered from reading the works of others.²⁹ Another explanation may be that a researcher became immersed in what she read so as to

28. See Stearns, *supra* note 25, at 513-14; *infra* note 30. While editing a book for publication, Stearns discovered at least five instances of plagiarism. The book's author attributed the plagiarism apparently to his failure to indicate passages copied verbatim from sources. Stearns, *supra* note 25, at 513-14. In the past, plagiarism of this type might not have been detected readily; however, plagiarism detection software may make detection more likely. See *infra* notes 141-43 and accompanying text.

29. Believing that written passages are one's own instead of remembering that the passages are based on something one has read is called cryptomnesia. POSNER, *supra* note 4, at 97.

mentally absorb specific wording; the wording might be used in the author's manuscript and could in turn become the basis for plagiarism allegations. Finally, many legal writers write with co-authors, which could give rise to additional plagiarism claims; where one co-author plagiarizes, the reputation of the innocent co-author may be similarly tainted.

Some view the action of the unintentional plagiarist as undeserving of sanction, while others argue that the onus is on the writer to be more careful.³⁰ From the viewpoint of both the person whose work has been plagiarized and the reader of the plagiarized text, the effect is the same, whether the plagiarism is intentional or unintentional. By borrowing another's words or ideas, the plagiarist is deceiving the reader into believing that those words or ideas are original.

C. Self-Plagiarism: Borrowing from One's Own Prior Publications

Borrowing from one's own prior publications without acknowledging the source is sometimes referred to as self-plagiarism.³¹ Although plagiarism of another's work is roundly condemned, there is little consensus as to whether self-plagiarism is intellectually dishonest.³² A researcher may develop certain central ideas through a series of books and articles, which is a typical result of a tightly circumscribed research agenda. An author can distinguish between borrowing passages from his own previously authored pieces and borrowing passages from another author's writing because there is no problem with consent. However, in academe, reuse of one's prior written work may arguably conflict with the assumption that each piece is original. This may become important to evaluators for purposes of hiring, promotion, and tenure. Professional journals and publishing companies publish professors' articles and books

30. For example, Central Connecticut State University's president, Richard L. Judd, plagiarized passages of an opinion article published in the newspaper, and took responsibility for his actions. Judd stated, "I mistakenly assumed notes I had made were my own, and I thus incorporated them without attribution." He added, "I should have done a better job of vetting my text. I had no intention of using another's words or misleading readers" Audrey Williams June, *Connecticut President Accused of Plagiarism*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 26, 2004, at A30.

31. See Stearns, *supra* note 25, at 543-44. An additional concern is that self-plagiarism can involve copyright infringement. When an article is published in a professional journal, the author customarily assigns the copyright in the article to the journal. A second journal may infringe the first journal's copyright if the second journal publishes an article containing similar or identical wording to an article by the same author previously published in the first journal. See *id.* at 544; see also Patrick M. Scanlon, *Song from Myself: An Anatomy of Self-Plagiarism*, 2 PLAGIARY 1, 4 (2007).

32. For example, Judge Posner views self-plagiarism as "a distinct practice and rarely an objectionable one." POSNER, *supra* note 4, at 108. Posner's view conflicts with the publication guidelines of various scientific organizations. See *infra* notes 33-36, 39, 45-46.

with the understanding, usually explicitly given by the author, that the articles and books are original scholarship. Similarly, because hiring, promotion, and tenure decisions in academe are largely based on publication, a professor who republishes has an unfair advantage because she can produce more publications in a shorter period of time.³³

Self-plagiarism can take several forms. Perhaps the most objectionable practice, “duplicate” publication, occurs when one submits a previously published article to another journal with a different title and without reference to the prior publication.³⁴ A variation is to submit a previously published article to another journal with a different title, a different introduction, and a different conclusion, but with the balance of the text copied from the prior publication without reference to the prior publication.³⁵ Another related practice, “redundant” publication, takes place when one rewrites the language of the article, but retains the substance of a previously-published article and submits the manuscript to a different journal, omitting any reference to the prior publication.³⁶ A twist on these two practices is where the new journal knows of the prior

33. There are other dangers in allowing self-plagiarism. See Christian Collberg & Stephen Kobourov, *Self-Plagiarism in Computer Science*, 48 COMM. ACM 88, 90 (2005). In the article, the two computer scientist authors condemn self-plagiarism and recognize the following “detrimental effects” of the practice:

- It can give the public the idea that research dollars are spent on rehashing old results rather than on original research, simply to further the careers of researchers;
- It can indicate to our colleagues that academic dishonesty is not a big problem. In the worst case this could lead to more serious forms of academic dishonesty becoming more acceptable;
- It rewards authors who break down their results into overlapping least-publishable units over those who publish each result only once; and
- Whenever a self-plagiarized paper is allowed to be published, another, more deserving paper, is not.

Id.

34. MIGUEL ROIG, AVOIDING PLAGIARISM, SELF-PLAGIARISM, AND OTHER QUESTIONABLE WRITING PRACTICES 17-19 (2006), <http://facpub.stjohns.edu/~roigm/plagiarism.doc>. Dr. Roig’s paper was one of the educational resources created for the “responsible conduct of research” and supported by the U.S. Office of Research Integrity (ORI). *Id.* at 1. ORI “promotes integrity in biomedical and behavioral research supported by the U.S. Public Health Service (PHS) at approximately 4,000 institutions worldwide.” Office of Research Integrity, <http://ori.dhhs.gov/> (last visited Mar. 21, 2008).

35. ROIG, *supra* note 34, at 17.

36. *Id.* Roig’s focus is publication in the sciences, with a heavy emphasis on empirical data. He calls two questionable practices concerning the publication of empirical data “salami slicing” and “data augmentation.” *Id.* at 19-20. Salami slicing references the practice of dividing the data derived from a single study so as to publish more than one article. *Id.* Data augmentation references the practice of publishing one article based on a study, collecting more related data, and publishing a second article based on the combined data. *Id.* at 20.

publication, but deletes any reference to it because of its reader-friendly or non-scholarly format, or for other reasons.³⁷ The amount of writing copied from a previously published article can also affect whether the duplication is considered plagiarism. While reuse of writing from a previous publication is disfavored, the practice arguably becomes less objectionable as a smaller percentage of the previously published article is copied and included in another manuscript.³⁸

There are some reuses that may be more acceptable. Scholars often present papers at professional conferences and then publish in the conference proceeding, in print or online, before they submit the paper to an academic journal for publication.³⁹ The scholar may also post her article online as a working paper as part of a series sponsored by her institution or by an academic organization prior to publication in an academic journal. Many schools give professors some type of publication credit for these activities. The custom in many academic organizations allows the author to submit her conference paper to an academic journal for publication, often with little revision, but this is not always true. Sometimes, publishing in a conference proceeding will bar republication in a journal, depending on the publication policy of the journal.⁴⁰ If the article is substantially revised, will that then make republication permissible? The rules are less than clear, but self-

37. This may be the case for practitioner-oriented publications.

38. Even if less objectionable, copying from a previously published article is plagiarism and may be copyright infringement. *See infra* note 135.

39. *See* Chris Graf et al., *Best Practice Guidelines on Publication Ethics: A Publisher's Perspective*, 61 INT'L J. CLINICAL PRAC. 1, 4 (2007), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1742-1241.2006.01230.x>. One prominent publisher suggests the following: "Journal instructions should clearly explain what is, and what is not, considered to be prior publication. Abstracts and posters at conferences [and] results presented at meetings . . . are not considered . . . to be prior publication." *Id.*

40. *See* R.A. Val, *The Scoop on Plagiarism*, IEEE ROBOTICS & AUTOMATION MAG., Sept. 2007, at 4 ("One of the most common questions that arises is the republication of one's conference paper in a journal. Researchers' views vary on the propriety of this, and the customs vary from field to field. I have seen reviewers automatically reject such papers on the grounds that the paper has already been published. However, this is not necessarily valid. The IEEE gives the editors-in-chief (EICs) discretion regarding republication. As stated in Section 8.1.7 of the Publication, Services and Products Board (PSPB) Operations Manual: 'The publication of a conference paper or papers in an IEEE periodical is permitted at the discretion of the editor provided that all the papers have undergone the standard peer review for the specific periodical in question.' Thus, it is important the EICs ensure that they have a clearly stated policy regarding republication of conference papers and that the policy is promulgated to both reviewers and authors. Authors should be sure they understand the policy before submitting conference papers to IEEE journals.").

plagiarism is becoming more of a concern to professional journals seeking to publish original work.⁴¹

The following is a summary table of types of self-plagiarism:

<i>Types of Self-plagiarism</i>	
Republication with new title only	
Republication with new title, introduction, and conclusion	
Publication of partially rewritten prior publication	
Publication of rewritten publication	
Publication of conference paper in conference proceeding	
Republication of revised conference proceeding publication	
Republication of a working paper previously published online	
Publication of revised working paper previously published online	

D. Authorship: Giving Credit

The persons named as authors of an article may not accurately reflect the true authorship of an article, either because someone who did not participate is named or someone who did participate is unnamed. Incorrect authorship can occur for a number of reasons. The authors of a manuscript might name a well-known person or “guest” author to improve the paper’s chance of acceptance for publication. Other possible reasons include making someone a “gift” or “honorary” author to honor a senior faculty member or acknowledge the leadership of an administrator; to bolster a tenure-track or a junior faculty member’s publication record; or because the author has yielded to pressure from a senior person who exerted pressure to be named. Conversely, a person who lacks power, such as a student, may be omitted as an author on an article even though the person made a major contribution. That person is in effect a “ghost” author.⁴² These actions may not reflect intent to

41. See Scott Carlson, *Journal Publishers Turn to Software to Root Out Plagiarism by Scholars*, CHRON. HIGHER EDUC. (Wash., D.C.), June 10, 2005, at A27. For example, Christian Colberg developed software called the Self-Plagiarism Detection Tool after he discovered that portions of some papers submitted to conferences for publication had been previously published. *Id.*; see also SPLaT—The Self-Plagiarism Tool, <http://splat.cs.arizona.edu> (last visited Mar. 21, 2008).

42. EDITORIAL POLICY COMM., COUNCIL OF SCI. EDITORS, CSE’S WHITE PAPER ON PROMOTING INTEGRITY IN SCIENTIFIC JOURNAL PUBLICATIONS 18 (2006), available at http://www.councilscienceeditors.org/editorial_policies/whitepaper/entire_whitepaper.pdf; see also ROIG, *supra* note 34, at 15-16 (explaining that organizations disagree over whether a lack of authorship for students or similar contributors constitutes plagiarism). The problem of an article’s named authors not accurately reflecting the persons who should be named as authors is not exclusive to scientific writing and affects other academic disciplines, including the law. See, e.g., POSNER, *supra* note 4, at 22-23 (“[M]any law

deceive. For instance, should a person who discussed the framework of the study or even developed the idea for the study but did not participate in the research and writing be an author? Should a person who collected data or did a literature review be considered an author?

Some students have leveled plagiarism claims against professors who misappropriated the students' writings.⁴³ Sometimes the situation is more subtle, as when a student or research assistant writes for a professor without a clear understanding of whether the professor will credit the student.⁴⁴

The following are two summary tables of contributions that may or may not indicate authorship:

Reasons for Authorship Recognition

Well-known person or guest author
Gift or honorary author
Senior faculty member
Administrative leadership
Desire to improve junior faculty member's record
Pressure by one in power position
Original idea or framework
Agreement
Lack of agreement

Reasons for Lack of Authorship Recognition

Student work
Research assistant work
Paid work
Junior faculty member
Non-substantial contribution
One subordinate in relationship
Data or literature review only
Agreement
Lack of agreement

professors continue, particularly in the legal treatises and textbooks they write, to publish without acknowledgement material drafted by their student research assistants.”).

43. See *infra* notes 79-82 and accompanying text. Evidence of a professor plagiarizing from a student is largely anecdotal. Professors would be understandably reluctant to reveal that they had plagiarized student writing, and the authors' research did not locate any statistics indicating the frequency with which professors plagiarize. Henriette Haas, a forensic psychologist and lecturer at the University of Zurich, studied the phenomenon of senior faculty members plagiarizing the work of students or more junior faculty members and identified a number of “[r]ed flags of scientific misconduct.” Henriette Haas, Haas-Consulting, *Against Plagiarism* (2007), <http://www.haas-consulting.com/plagiarism.html>. It is unknown whether a professor plagiarizing a student's writing is a common practice, but based on anecdotes, it appears to be more than a myth.

44. A similar situation arises when someone pays another for research, such as in a work-for-hire arrangement.

Guidelines for scientists who are accountable to funding institutions often include criteria to determine who should be named as authors on an article.⁴⁵ The trend in the scientific research community is to distinguish between an author and a contributor. For example, the standards of the International Committee of Medical Journal Editors (ICMJE) specify that a person should be named as an author only if the person has satisfied a number of specific criteria: "Authorship credit should be based on 1) substantial contributions to conception and design, or acquisition of data, or analysis and interpretation of data; 2) drafting the article or revising it critically for important intellectual content; and 3) final approval of the version to be published."⁴⁶ These criteria for

45. For example, the ORI investigates incidents of misconduct, including plagiarism, under the Federal Policy on Research Misconduct. NICHOLAS H. STENECK, DEP'T OF HEALTH & HUMAN SERVS., ORI INTRODUCTION TO THE RESPONSIBLE CONDUCT OF RESEARCH 9-10, 20-21 (2006), *available at* <http://ori.hhs.gov/documents/rcrintro.pdf>. The ORI encourages research integrity by supporting writing that describes responsible research conduct. Publications concerning responsible conduct and information on misconduct investigations are accessible from the ORI website. *See* Office of Research Integrity, *supra* note 34. The website of the Online Ethics Center at the National Academy of Engineering, formerly the Online Ethics Center for Engineering and Science, contains more information on the ethics codes of various engineering and science organizations. Online Ethics Center, <http://onlineethics.org> (last visited Mar. 21, 2008).

46. INT'L COMM. OF MED. JOURNAL EDITORS, UNIFORM REQUIREMENTS FOR MANUSCRIPTS SUBMITTED TO BIOMEDICAL JOURNALS: WRITING AND EDITING FOR BIOMEDICAL PUBLICATION (2007), *available at* <http://www.icmje.org>. "All contributors who do not meet the criteria for authorship should be listed in an acknowledgments section." *Id.*

IEEE (formerly the Institute of Electrical and Electronics Engineers, Inc.) adopted an operations manual that tracks the ICMJE definition of authorship. IEEE, IEEE PUBLICATION SERVICES AND PRODUCTS BOARD OPERATIONS MANUAL 56 (2008), *available at* http://www.ieee.org/portal/cms_docs_iportals/iportals/publications/PSPB/ops_manual.pdf. The manual also contains a detailed flowchart to be followed in investigating plagiarism allegations, including improper use of passages from one's own previously published articles, and sanctions for plagiarism. *Id.* at 61-63. Sanctions include a written apology to the author whose work has been plagiarized, a written notice in the IEEE publication where the plagiarized paper was published, and suspension of publication privileges. *Id.* at 64-70.

In 2006, Blackwell Publishing released a publication ethics guide that adopts the ICMJE definition of authorship. Graf, *supra* note 39, at 3; *see also* Blackwell Publishing Press Room, Blackwell First Publisher to Deliver Comprehensive Guide on Publication Ethics, <http://www.blackwellpublishing.com/press/pressitem.asp?ref=988> (last visited Mar. 21, 2008).

The ICMJE definition of authorship has been replaced by some scientists and scientific organizations with a standard requiring that, in lieu of naming authors, an article should name contributors and state each contributor's role in producing the article. *See* EDITORIAL POLICY COMM., *supra* note 42, at 17. This new standard reflects the numerous people who typically contribute to a scientific article. *See id.*; *see also* COMM. ON PUBLICATION ETHICS, GUIDELINES ON GOOD PUBLICATION PRACTICE 70 (2003), *available at* <http://www.publicationethics.org.uk/guidelines/reports/2003/2003pdf15.pdf>

authorship pertain to an article based on empirical data. However, it is possible that the criteria could be adapted to determine whether a person should be named as author in an article based on qualitative research.⁴⁷

E. The Distinction Between Plagiarism and Copyright Infringement

Plagiarism and copyright infringement are not coextensive, though the same copying can potentially give rise to both claims. As previously discussed, plagiarism extends to the use of another's words without attribution, and even can extend to the use of another's information and ideas.⁴⁸ While plagiarism is certainly an ethics violation, it may or may not give rise to a criminal or civil action under the copyright law. Copyright infringement is a legal wrong based on the theory that an author has a property interest in the authored text. The copyright statute provides the author a legal remedy against one who has infringed his rights.⁴⁹ However, copyright protection does not extend to facts or ideas, nor, as more fully explained below, does it protect a document in the public domain.⁵⁰ Because it is often difficult to show actual economic damage, authors who can prove a copyright violation, but who cannot prove actual damages, may elect to receive statutory damages.⁵¹

There are several situations where copying without permission is not a copyright violation, though it may still be plagiarism. First, the "fair use" exception of the copyright law allows use of another's material without permission.⁵² Factors considered in determining whether the exception applies include the purpose for which the material is borrowed (commercial versus not-for-profit), the amount of material that is copied, and the effect the borrowing has on the value of the original work.⁵³

(detailing similar standards adopted in the United Kingdom that do not provide a specific definition of authorship, but do indicate that authorship should be based on a substantial contribution to the article and an acceptance of the responsibility that comes with being named as an author).

47. The authors suggest a standard for naming authors in legal scholarship loosely based on the ICMJE standard for authorship. *See infra* note 139 and accompanying text.

48. *See supra* notes 25-27 and accompanying text.

49. 17 U.S.C. § 504 (2000 & Supp. V 2005).

50. Documents are "public domain" documents either because they are not copyrightable or because the document's copyright protection has expired. *See infra* notes 54-60 and accompanying text for further discussion of documents in the public domain.

51. *See* 17 U.S.C. § 504 (making one who infringes another's copyright potentially liable, either for actual damages or for statutory damages not less than \$750 and not more than \$30,000 per infringed work).

52. 17 U.S.C. § 107 (2000).

53. *Id.* The fair use exception to copyright protection provides:

Notwithstanding the provisions of sections 106 and 106A [outlining the rights associated with copyright protection], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other

Because plagiarism does not incorporate the copyright law's fair use exception, even copying a few words without a profit motive or an effect on the value of the work can constitute plagiarism.

Second, one may copy information in the public domain without running afoul of the copyright laws. A document in the public domain lacks copyright protection; thus, anyone can copy and use portions of a document that is in the public domain.⁵⁴ Two large classes of documents in the public domain are those whose copyright protection has expired and certain types of government documents.⁵⁵ If the copyright has expired, the material is in the public domain and another person may use it without infringing copyright.⁵⁶

The Copyright Act of 1976 precludes the federal government from claiming copyright protection for documents produced by federal government employees.⁵⁷ However, the Act does not specifically state whether state and local governments are likewise precluded from claiming copyright protection for state and local government documents. Thus, although federal cases and statutes are in the public domain, state and local government productions may or may not be in the public domain.⁵⁸ As a result of this prohibition, using passages of a federal statute or legal decision without acknowledging the source does not violate copyright law, but their use without attribution does constitute plagiarism.

means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

54. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

55. 17 U.S.C. §§ 105, 302 (2000); see also *Dastar Corp.*, 539 U.S. at 33-35.

56. *Dastar Corp.*, 539 U.S. at 33-34. The term of copyright generally is life of the author plus seventy years. 17 U.S.C. § 302.

57. See 17 U.S.C. § 105.

58. Katie M. Colendich, Note, *Who Owns "the Law"? The Effect on Copyrights When Privately-Authored Works are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589, 599-600 (2003).

A fairly new question is whether a copyrighted work, such as a building code written by a trade association, falls into the public domain if it is enacted into law. In 2002, the U.S. Court of Appeals for the Fifth Circuit considered this issue. The court, in an en banc decision, held that a copyright holder loses copyright protection when a local government adopts the model code as law.⁵⁹ However, the federal courts are split on this issue, with the U.S. Courts of Appeals for the Second and Ninth Circuits reaching contrary conclusions.⁶⁰

There are situations where copying may violate the copyright laws but not constitute plagiarism. For example, someone who copies a document bearing the author's name without obtaining copyright permission has infringed the copyright, but the person would not have plagiarized because the document is properly attributed to its author. Because the publisher often owns the copyright, an author's reuse of his own published work without obtaining copyright permission may infringe the publisher's copyright.⁶¹

Academic institutions, governmental agencies, and professional organizations police plagiarism as a violation of ethics rules. Many professional organizations are developing research misconduct policies, often in response to mandates of governmental agencies that are funding their research.⁶² This self-policing will add a legalistic process for dealing with research misconduct, including plagiarism, which coexists with the copyright law. The following table compares plagiarism and copyright infringement in summary form:

59. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 806 (5th Cir. 2002) (en banc).

60. *See Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994).

61. *See generally* SCHOLARLY PUBLISHING & ACADEMIC RESOURCES COALITION, *AUTHOR RIGHTS* (2006), available at http://www.arl.org/sparc/bm~doc/SPARC_AuthorRights2006.pdf (describing how an author can modify publication agreements in order to retain copyright in his own work, and noting that "[t]he author is the copyright holder . . . unless and until [he] transfer[s] the copyright to someone else in a signed agreement"). Some academic organizations that publish academic journals allow the author to retain copyright in the article, with the academic organization retaining copyright in the compilation of articles.

62. *See supra* notes 45-46 and accompanying text.

<i>Plagiarism</i>	<i>Copyright Infringement</i>
Ethical Issue	Legal Issue
Defined by research misconduct policies	Governed by federal law
Definition may extend to ideas	Does not extend to ideas
Includes public domain	Does not include public domain
No fair use exception	Fair use exception
Violations result in loss of reputation, job, etc.	Violations award actual or statutory damages to the copyright holder
Never expires	Expires (life of the author + 70 years)
Avoided by attribution	Attribution not a defense

II. PLAGIARISM AND AUTHORS OF LEGAL DOCUMENTS: PROFESSORS, JUDGES, PRACTITIONERS, AND BAR APPLICANTS

The field of law is heavily grounded in the writing of documents. Most law professors, judges, and practicing lawyers devote considerable effort to researching the law and composing a variety of legal writings, including law journal articles, client memoranda, appellate briefs, and legal opinions. This section explores plagiarism in the context of the differing goals of each attorney group for the legal writings they produce.

A. Plagiarism and Legal Academe

Some lawyers would rather teach than practice, and one of the hallmarks of life in legal academe is research, followed by the publication of original scholarship.⁶³ Promotion, tenure, and salary increases for law and legal studies professors depend, at least in part, on the professor's record as a scholar. If scholarship is represented as original when it is not, reviewers are relying on a material misstatement in their decision-making. Misconduct by a professor can run the gamut from copying published passages to fabricating or falsifying sources or data. Plagiarism can also include issues involving the authorship of colleagues, research assistants, and students.⁶⁴ It can certainly be argued that the academic institution that retains or promotes a professor based on a misunderstanding of the originality of scholarship has been injured and should be able to receive damages or equitable relief. In addition, the original author also is injured. A plagiarist who gains book royalties, a

63. The pressure to publish fuels the need for numerous law journals. Washington and Lee University's web-based guide to legal publications and rankings lists over 1400 outlets for law-related scholarship. See Washington & Lee Law School, Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Mar. 21, 2008). The ExpressO online delivery service has automated the law review submission process. ExpressO, <http://law.bepress.com/expresso/> (last visited Mar. 21, 2008). Most professors make numerous submissions and have multiple publications during the course of their careers.

64. See *supra* notes 42-44 and accompanying text.

promotion, a salary raise, or even an enhanced reputation due to a plagiarized publication is receiving a misdirected or unearned financial benefit at the original author's expense. It can even be argued that other professors who received negative reviews have also been injured because of the comparative nature of evaluation systems.

A plagiarism claim against a professor is an extremely serious accusation, the moral equivalent of a "capital intellectual crime,"⁶⁵ as it goes to the heart of the professorial endeavor. A professor accused of plagiarism faces loss of reputation and may miss out on further publishing and employment opportunities.⁶⁶ Once labeled a plagiarist, the person's reputation will likely be under a permanent cloud. Even unproven or erroneous accusations may have a deleterious effect on a professor's reputation.

Allegations of plagiarism can also reflect poorly on the author's academic institution. In 2004, a number of plagiarism claims against Harvard law professors were widely reported in the media, perhaps because of the institution's high reputation. Charles J. Ogletree Jr. apologized for the "serious mistake" of having plagiarized approximately six paragraphs in his book from another law school professor's book.⁶⁷ Harvard disciplined Ogletree for the incident, although it is unclear what sanctions Harvard imposed.⁶⁸ Laurence H. Tribe apologized for passages

65. POSNER, *supra* note 4, at 107.

66. Plagiarism can have some serious consequences. See *infra* notes 67-77 and accompanying text. In a recent highly publicized case, a Harvard undergraduate's novel was pulled from distribution after similarities with other works were noted. David A. Fahrenthold, *Novelist's Unconscious Borrowed a Few Phrases*, WASH. POST, Apr. 25, 2006, at C1. Though Kaavya Viswanathan claimed "unconscious copying" and initially said that the book would be reissued without the offending passages, *id.*, the publisher pulled it from sale and decided not to reissue. David A. Fahrenthold, *Publisher Pulls Young Author's Suspect Novel*, WASH. POST, Apr. 28, 2006, at C1. Even a figure in a business unrelated to publishing can be embarrassed by charges of plagiarism. For instance, Raytheon's chief executive officer William Swanson "apologized at the annual shareholders' meeting, and . . . [was] docked . . . the equivalent of \$1 million" after it was discovered that he had copied his free booklet *Swanson's Unwritten Rules of Management* from a sixty-year-old engineering publication. Cullen, *supra* note 2. Carl Durrenberger, a Hewlett Packard engineer who discovered the plagiarism, posted "Bill Swanson of Raytheon is a plagiarist!" on his blog. *Id.* Swanson claimed that his booklet was based on a presentation compiled from various materials he kept in a file, and that the plagiarism was "an innocent mix-up." *Id.* Explanations similar to Viswanathan's and Swanson's are commonly proffered by those who claim their plagiarism was unintentional. See *supra* Part I.B.

67. Apparently, Mr. Ogletree's research assistant inserted the paragraphs, and quotation marks were omitted by mistake. Scott Smallwood, *The Fallout*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 17, 2004, at A12 (internal quotation marks omitted).

68. *Id.* The potential for a libel lawsuit against the accuser or the press may chill valid plagiarism charges. In today's litigious society, academic institutions, academic journals, and professional organizations might be reluctant to discipline the alleged plagiarist for

in his 1985 book that plagiarized material from another author's 1974 book.⁶⁹

However, a professor may dispute a plagiarism accusation, which may lead to negotiation between the parties. For example, Norman G. Finkelstein, an assistant professor of political science at DePaul University, accused Alan M. Dershowitz, a Harvard Law School professor, of including plagiarized passages in his book *The Case for Israel*.⁷⁰ Finkelstein made the claim in his manuscript *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History*. In response, Dershowitz hired legal counsel and threatened to sue over the accusatory language.⁷¹ The potential for legal action delayed publication of Finkelstein's book and caused him to revise certain language prior to publication.⁷²

Many reported incidents of professor plagiarism involve fields other than law. In a number of such incidents, plagiarism has led to the loss of

fear of being sued for libel, among other charges. See David Glenn, *Judge or Judge Not?*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 17, 2004, at A16. Discoverers of plagiarism may fear coming forward, and those that do may feel that little is being done to discipline the plagiarist or that the discipline imposed is not severe enough. See *id.* One who discovers plagiarism may believe that an educational institution might whitewash the plagiarism claim because the alleged plagiarist is prominent or because the institution fears that the plagiarism claims may reflect poorly on the institution. The complainant may suffer in the same manner as whistleblowers often do. See *id.* Some professional organizations may not have the funds or the personnel to investigate the plagiarism charges and pursue sanctions against the offender. See *id.* (noting that most professional organizations have "no teeth" when it comes to imposing sanctions for misconduct).

69. Smallwood, *supra* note 67. Harvard University investigated the plagiarism charges against Tribe, finding that although the plagiarism was "unintentional," it was "a significant lapse in proper academic practice." *News in Brief: 'Unintentional' Lapse*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 29, 2005, at A10 (internal quotation marks omitted).

70. Jennifer Howard, *Calif. Press Will Publish Controversial Book on Israel*, CHRON. HIGHER EDUC. (Wash., D.C.), July 22, 2005, at A1.

71. *Id.*

72. *Id.* Finkelstein changed the term "plagiarizes" to "lifts from" or "appropriates from without attribution" and included his findings and the Harvard University definition of plagiarism in the book appendix. *Id.* Lynne Withey, director of the University of California Press and president of the Association of American University Presses, urged the university presses not to refrain from publishing controversial books. *Id.* Withey, who was embroiled in the disagreements between Finkelstein and Dershowitz, noted the existence of "a political culture that seems bent on suppressing information." *Id.* DePaul University denied Finkelstein tenure in June of 2007 and canceled his fall 2007 classes. Jennifer Howard, *DePaul Cancels Courses of Professor Who Lost Tenure Bid*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 7, 2007, at A13. Finkelstein resigned after settling with DePaul. Paula Wasley, *Tenure Dispute at DePaul Ends With a Settlement and a Resignation*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 14, 2007, at A9.

academic appointment or being stripped of an honor.⁷³ Sometimes the plagiarized material was scholarship, such as a book, but other times the plagiarism involved a newspaper article or commencement address.⁷⁴

There are also plagiarism problems in government-sponsored research. From 1992 through 2005, the U.S. Office of Research Integrity (ORI) found eight instances of plagiarism and eleven instances of data falsification and plagiarism in grant applications submitted to the U.S.

73. For example, in 2005, the University of Missouri at Kansas City forced the dean of the College of Arts and Sciences to take administrative leave after the dean admitted to including plagiarized passages in his December 2003 commencement address. Thomas Bartlett, *Missouri Dean Appears to Have Plagiarized a Speech by Cornel West*, CHRON. HIGHER EDUC. (Wash., D.C.), June 24, 2005, at A13; Dan Carnevale, *Plagiarizing Dean Is Put on Leave*, CHRON. HIGHER EDUC. (Wash., D.C.), July 1, 2005, at A10. Oklahoma State University removed a geography professor from the classroom and took away his designation as regents professor, an honor for those professors with a national reputation for scholarship. In addition, the professor's publisher classified his book as out of print because it contained a number of long plagiarized sections. Thomas Bartlett & Scott Smallwood, *Just Deserts?*, CHRON. HIGHER EDUC. (Wash., D.C.), April 1, 2005, at A26 [hereinafter Bartlett & Smallwood, *Just Deserts?*]; see also Thomas Bartlett & Scott Smallwood, *Four Academic Plagiarists You've Never Heard Of*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 17, 2004, at A8 [hereinafter Bartlett & Smallwood, *Four Academic Plagiarists*]. A history professor lost jobs at the University of Quebec and at the State University of New York at Plattsburgh for allegedly including several pages of a chapter plagiarized from a history book. Bartlett & Smallwood, *Just Deserts?*, *supra*; see also Bartlett & Smallwood, *Four Academic Plagiarists*, *supra*. The American Historical Association determined that a Wichita State University history professor's published essay plagiarized an unpublished dissertation, which was later published as a book. The history professor was denied tenure at one institution and lost a tenure-track position at another institution. Bartlett & Smallwood, *Four Academic Plagiarists*, *supra*; see also *A Plagiarized Writer Speaks Out About Her Case*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 1, 2005, at A27. A professor who had served for thirty years at the New School University's Parsons School of Design resigned because sections of his book had been copied from other published books. Scott Smallwood, *Professor at New School U. Resigns*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 1, 2004, at A14. Parsons' dean stated, "Frankly, we could not tolerate a faculty member who had engaged in the same infraction that we would dismiss a student for." *Id.*; see also Scott McLemee, *Hot Type*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 24, 2004, at A18. The president of Central Connecticut State University resigned after plagiarizing several passages in a newspaper article. Sharon Walsh, *Accused of Plagiarism, President to Retire*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 2, 2004, at A29. The University of New Hampshire found that a professor had engaged in "scholarly misconduct" for including in a newspaper article excerpts from a letter written by the governor of Delaware. Scott Smallwood, *U. of New Hampshire Disciplines Professor Accused of Plagiarizing a Governor's Letter*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 2, 2004, at A12. The Naval Academy revoked a professor's tenure and demoted him from associate to assistant professor after it was discovered that passages in the book he authored were plagiarized. Thomas Bartlett, *Naval Academy Demotes Professor Accused of Plagiarism in a Book on the A-Bomb*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 7, 2003, at A12.

74. See *supra* note 73.

Public Health Service.⁷⁵ Sanctions for such misconduct include publishing the name of the plagiarist and the circumstances of the plagiarism, requiring the plagiarist in future grant applications to certify that authority in the applications was properly given, barring the plagiarist from serving in Public Health Service committee positions for a certain time period, and barring the plagiarist from receiving federal grant money for a certain time period (“debarment”).⁷⁶ In all nineteen cases identified by the ORI, the plagiarists suffered the humiliation of having their names and the circumstances of the plagiarism published.⁷⁷

Although the discipline meted out to academics sometimes can be severe, some plagiarism cases are barely acknowledged or take a long time to garner attention.⁷⁸ In particular, copying from student writing in legal and other academic scholarship is a gray area in plagiarism. When reported, some academic institutions take strong measures, whereas others administer little more than a slap on the wrist. Factors that may influence the severity of the sanction against a professor for allegedly plagiarizing from a student include whether the professor also plagiarized non-student work and whether the student worked for the professor. An institution may be more willing to sanction a professor for plagiarizing from a student when there are other incidents involving plagiarism by the professor. For example, an engineering professor was dismissed after a university committee found that the professor failed to credit the co-

75. Alan R. Price, *Cases of Plagiarism Handled by the United States Office of Research Integrity 1992-2005*, 1 *PLAGIARY* 46, 46 (2006). Price describes the circumstances of each instance and the sanctions imposed. *Id.* at 47-51.

76. 42 C.F.R. §§ 93.407, 93.411 (2007); Price, *supra* note 75, at 47.

77. The information is included in a number of publications including the Federal Register, the NIH Guide to Grants and Contracts, the ORI Case Summaries, the ORI Newsletter, and the ORI Annual Report. Price, *supra* note 75, at 51-52. ORI required certification of most of the plagiarists and prohibited them from serving in Public Health Service committee positions for varying periods of time. *Id.* at 47. In addition, ORI debarred one of the eight persons who had committed only plagiarism but debarred nine of the eleven persons whose misconduct was a combination of data falsification and plagiarism. *Id.* at 47, 49.

78. For example, in Reverend William W. Meissner's book *The Ethical Dimension of Psychoanalysis: A Dialogue*, published in 2003 by the State University of New York Press, he allegedly plagiarized portions of Ernest Wallwork's 1991 book *Psychoanalysis and Ethics*. Thomas Bartlett, *Theology Professor is Accused of Plagiarism in His Book on Ethics*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Jan. 21, 2005, at A10. Wallwork complained to SUNY Press, but no action was taken. The Press's interim director stated, “We decided that any errors in attribution were inadvertent and minor” and added, “[w]e didn't feel that there was a situation that warranted further action on our part.” *Id.* Wallwork also complained to the Boston Psychoanalytic Society, which concluded that there was a “serious breach of professional and scholarly standards.” *Id.* The Press planned to reexamine Wallwork's claims once it received the Society's decision. *Id.*

author of a joint research project and claimed sole authorship of two articles that were ninety percent prepared by students.⁷⁹

However, plagiarism claims made by a graduate student against a professor with whom the student has worked may be discounted, because the institution may find evidence that the borrowing was consensual. Arizona State University investigated an allegation by a graduate student and made a “finding of plagiarism”; however, the finding was softened by the comment that “much of the work in question arose during a previous collaborative relationship.”⁸⁰ The university did not otherwise discipline the professor.⁸¹ In another case involving a graduate student who claimed a professor had plagiarized her work, two Cornell University faculty committees reached conflicting decisions over whether the professor’s conduct amounted to plagiarism.⁸²

It is particularly troubling when allegations of plagiarism are raised against graduate students, many of whom are aspiring to a life in academe. A graduate student in engineering at Ohio University, Thomas A. Matrka, raised claims that a number of his fellow graduate students had plagiarized portions of their master’s theses.⁸³

79. *Yu v. Peterson*, 13 F.3d 1413, 1414-15 (10th Cir. 1993).

80. Bartlett & Smallwood, *Just Deserts?*, *supra* note 73 (internal quotation marks omitted). Dwayne Kirk, a graduate student at Arizona State University, alleged that Professor Charles Arntzen had plagiarized one third of a chapter in his book from Kirk’s paper. After Kirk complained to the book editor, Kirk was acknowledged as co-author of the chapter. *Id.*; see also, Thomas Bartlett & Scott Smallwood, *Mentor vs. Protégé*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 17, 2004, at A14.

81. Bartlett & Smallwood, *Just Deserts?*, *supra* note 73.

82. *Demas v. Levitsky*, 738 N.Y.S.2d 402, 406-07 (N.Y. App. Div. 2002). After receiving her Ph.D in Education from Cornell University, Antonia Demas filed a grievance with the institution claiming that David Levitsky, a member of her graduate advisory committee, had allegedly plagiarized parts of her dissertation in a grant application and failed to name her as co-principal investigator. *Id.* at 405-06. Although a Cornell faculty committee found that Levitsky had not plagiarized from Demas, the original members of Demas’ graduate advisory committee claimed that Levitsky had plagiarized Demas’ work and criticized the faculty committee investigation. *Id.* at 406-07. Demas sued Levitsky and Cornell for “misappropriation, fraud, breach of contract, breach of fiduciary duty, negligence, tortious interference with prospective economic advantage, defamation, and intentional infliction of emotional distress.” *Id.* at 407. The trial court denied the defendants’ motions to dismiss the complaint. *Id.*

83. Thomas Bartlett, *Ohio U. Investigates Plagiarism Charges*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 10, 2006, at A9. Perhaps disgruntled when told that his own master’s thesis was “unacceptable,” Matrka began reviewing library copies of approved theses and discovered plagiarism, at least fifty pages in one instance and fourteen pages verbatim in another instance. *Id.* Matrka leveled claims that Ohio University professors “fostered a culture of cheating” and that the professors’ double standard permitted “some people to cheat their way through and h[e]ld others to a higher standard.” *Id.* Dennis Irwin, the engineering dean, created a committee to investigate the plagiarism charges and stated that sanctions might include revoking the plagiarists’ degrees and sanctioning

While not usually viewed as scholarship, professors often develop teaching materials for use by their students, such as study guides, assignments, quizzes, and tests. While some professors may draft the teaching documents from scratch, many borrow language from a colleague or from an instructor's manual. These documents differ from the professor's scholarly writing in that teaching documents are functional and are not ordinarily thought to be original in the same sense as scholarly writing. Unless the professor authors a textbook or instructor's manual, the professor does not normally claim copyright in the teaching documents and does not expect them to be subject to plagiarism standards.

Should these instances of copying teaching materials be treated differently from other academic work or should the same standards apply? A conscientious professor writing a manuscript takes great pains to quote passages borrowed from others and to credit the original authors. However, the same professor may borrow language from a colleague or an instructor's manual for use in a teaching document without it occurring to the professor to credit the original author. While it is not customary to classify material borrowed from another writer and inserted into teaching documents as plagiarism, this custom may be changing. Perhaps signaling a future trend, a midwest university student submitted an accusation to the university administration that a professor had plagiarized a test.⁸⁴ Originality is expected with legal scholarship; however, it can be argued that copying usually is allowed and even expected with documents produced for the classroom.

The first table below summarizes potential sources of plagiarism allegations against law and legal studies professors; the second table summarizes the types of publications that are potentially subject to these claims:

faculty who served as advisors on those theses. *Id.* Several committees examined plagiarism allegations concerning fifty-five theses that Matrka identified. As of the spring of 2007, the committees had cleared five, recommended that twelve be rewritten, and decided that twenty-two did not need to be investigated; the remainder are scheduled for review. As a result of the investigation, Ohio University revoked one student's master's degree. Paula Wasley, *Ohio U. Revokes Degree for Plagiarism*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 6, 2007, at A15.

84. This incident was informally reported to one of the authors. In an upper-level undergraduate or in a graduate class, one can generally assume that the class materials are unique to the professor, especially where there is no one textbook that fits the subject matter of the class and the professor implies authorship of all materials brought into the classroom. In those circumstances, a student might feel that the professor has plagiarized if the student discovers that the professor borrowed passages from another author.

Potential Sources of Plagiarism Allegations

Professors and authors
Graduate student assistants
Students in classes
Funding organizations, including the government
Academic organizations
Publishers
Peer reviewers
Journal editors

Publications that May Be Subject To Plagiarism Claims

Books
Articles
Theses or dissertations
Proceedings
Sponsored research
Newspaper articles
Commencement addresses
Teaching materials and tests

B. Plagiarism and the Judiciary

Whereas the academic publishing model is based on original scholarship, the judicial system is grounded in the doctrine of stare decisis, which requires the courts to consider and usually to follow precedent. Although both types of writing need to be persuasive, in contrast to the articles produced in legal academe, there is no need for judicial writing to be original. A judge's job is to decide cases based on the most compelling arguments in light of statutes and case precedent, and to explain the rationale underlying the decision in a clearly written opinion. The opinions usually follow precedent or, if they do not, explain departures in light of precedent, orienting their decision-making and writing towards past work. The judge is not expected to produce original scholarship.⁸⁵

A judge, faced with a heavy case load, may adopt written work developed by the parties to the case when writing the decision or taking other action related to the case.⁸⁶ A judge may ask the prevailing attorney to draft an order for the judge's signature, may use portions of court documents submitted by the attorneys in the case, or may have a

85. POSNER, *supra* note 4, at 22; see also Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236, 240 (1999) (discussing the memoranda of law students and noting that "in legal writing, it is no embarrassment to lean on another's opinion: it is a requirement").

86. POSNER, *supra* note 4, at 21.

law clerk write the first draft or even most of the final opinion. This practice is widespread and allows cases to be decided more expeditiously.⁸⁷ Although practicing attorneys are aware that it is a common practice for judges to borrow from the writing of attorneys and law clerks, the general public is mostly unaware of the practice.⁸⁸

The United States Supreme Court explored the practice of requesting the prevailing party to draft findings of fact and conclusions of law over twenty years ago in *Anderson v. City of Bessemer City*.⁸⁹ In that case, the prevailing party based its findings on the judge's preliminary memorandum, the other party had the opportunity to respond, and the trial court judge rewrote what the prevailing party submitted rather than adopt the findings verbatim.⁹⁰ The Court was critical of the practice, especially where the findings lacked reference to the case record, and noted the temptation presented to the prevailing party to overstate the findings in its own favor. However, the Court refused to condemn the practice, acknowledging that the findings, even if authored by the prevailing party, were the court's findings.⁹¹ The deciding factor for the Court seemed to be that the trial judge exercised independent judgment.⁹²

Despite the decision in *Anderson*, a non-prevailing party understandably may feel aggrieved when a trial judge adopts the prevailing party's findings of fact and conclusions of law verbatim. Because a verbatim adoption makes it appear that the judge did not weigh the non-prevailing party's view and that the judge failed to exercise independent judgment, the non-prevailing party could conceivably claim a violation of due process.⁹³ In fact, the United States

87. *Id.* at 20-21.

88. *Id.* at 20-22.

89. 470 U.S. 564, 572 (1985). In *Anderson*, the U.S. Court of Appeals for the Fourth Circuit had roundly criticized the trial court judge for adopting the substance of the prevailing party's proposed findings. *Id.* at 571. Although not fond of the practice, the Court took a more measured approach. "[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Id.* at 572.

90. *Id.* at 572-73. "[T]he District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party." *Id.* at 572.

91. *Id.*; see also Kristen Fjeldstad, Comment, *Just the Facts, Ma'am—A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of Law*, 44 ST. LOUIS U. L.J. 197, 197 (2000).

92. *Anderson*, 470 U.S. at 573 ("[W]e see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions.").

93. See *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 300-02 (3d Cir. 2005). There, the appellate court concluded that the trial court had not properly certified the settlement class because the court adopted findings of fact and conclusions of law submitted by the

Court of Appeals for the Third Circuit in *Bright v. Westmoreland County*, found that a prevailing party's ghostwriting of a court's opinion violated due process.⁹⁴ The court reversed the decision of the trial court where the judge, in dismissing the complaint, adopted the prevailing party's proposed order and opinion almost verbatim.⁹⁵ The court reasoned that the reversal was merited because the trial court had adopted the proposed order and opinion, rather than the findings of fact, and because the trial court had failed to exercise independent judgment.⁹⁶ "Judicial opinions are the core work-product of judges. . . . [T]hey constitute the logical and analytical explanations of why a judge arrived at a specific decision."⁹⁷ Another troubling aspect of the case was that the judge indicated his intent to dismiss the case even before the non-prevailing party filed its response, and then requested the soon-to-be prevailing party to file the proposed order and opinion.⁹⁸ The appellate court stated: "[Judicial opinions] are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic."⁹⁹

Neither *Anderson* nor *Bright* addressed or mentioned whether the trial court judges plagiarized from documents submitted by the attorneys.¹⁰⁰ Perhaps this was because it is not customary to associate a judge borrowing passages from the attorneys in the case and inserting the passages into the judge's opinion with wrongdoing, even though using another's words or ideas without crediting the original author would

class attorney verbatim. The appellate court commented that the only evidence that the trial court exercised independent judgment was its statement that it did. *Id.* at 301. The trial court requested proposed findings of fact and conclusions of law and indicated that it "would adopt [them] basically," and almost every trial court order was adopted verbatim from what the parties submitted. *Id.* The appellate court was "concerned that the District Court may have abdicated its role as a neutral and independent adjudicator or, at the very least, sacrificed independent judgment for administrative efficiency." *Id.* The appellate court added that "a court must set forth persuasive reasons, stated with objectivity, why the submissions of counsel totally reflect the independent judgment of the court." *Id.*

94. 380 F.3d 729, 731-32 (3d Cir. 2004).

95. *Id.* at 731. The trial court, aside from some minor changes, made only two substantive revisions to the proposed order and opinion. *Id.*

96. *Id.* at 731-32.

97. *Id.* at 732.

98. *Id.* at 730-31. On remand, the trial judge provided an explanation for his premature decision-making. *Bright v. Westmoreland County*, 341 F. Supp. 2d 525, 525-29 (W.D. Pa. 2004).

99. *Bright*, 380 F.3d at 732.

100. While this practice may raise copyright issues, liability is rarely, if ever, imposed because the prevailing attorney is flattered to have the attorney's writing inserted into the opinion. Also, much judicial copying would fall within the "fair use" exception because of its limited scope and its noncommercial, and perhaps even educational, purpose. See *supra* note 53, and accompanying text.

seem to constitute plagiarism. Although it can be argued that the judges committed plagiarism, accusations of judicial plagiarism are rare, or even nonexistent, because a judge's writing is not expected to be original.¹⁰¹

Plagiarism claims have been very rarely leveled against judges, despite the fact that much of their writing is not original. The prevailing attorney whose words are borrowed is not likely to complain because the practice serves the client. The opposing attorney typically refrains from complaining for fear of raising the judge's ire, knowing he or she is likely to appear before the judge in a future case. However, a judge who borrows extensively from the prevailing party or others in writing an opinion risks being accused of plagiarism by a losing attorney. In 2003, the losing attorneys in a case accused the intermediate appellate court of judicial plagiarism, contending that the judges had lifted portions of their opinion from opposing counsel's briefs.¹⁰² It is unclear whether the publicity of the case tarnished the reputation of the judges or even provided a deterrent against copying by other judges. What is clear is that judicial borrowing of another's writing without identifying the source of the writing, a customary practice, is currently a gray area in legal scholarship. Perhaps there is room for judicial reeducation on this practice. Otherwise, judges risk being accused of judicial plagiarism.

C. Plagiarism and the Practicing Attorney

Much of the writing in legal practice is collaborative, with the focus on the persuasiveness of the document, rather than its originality.¹⁰³ An attorney is expected to represent the best interests of clients when developing pleadings, motions, briefs, and memoranda of law for consideration by the court and when drafting transactional documents. Similar to the judiciary, *stare decisis* requires practitioners to research and develop arguments and documents that respond to precedent.¹⁰⁴ Practitioners often employ associates and law clerks to draft documents, with oversight by the partner whose client is being served. As a result, a document may be the work product of a number of attorneys.

101. For example, Judge Posner labels "judicial plagiarism" an "oxymoron." POSNER, *supra* note 4, at 72.

102. Laurie Cunningham, *Florida \$145 Billion Wipeout Survives*, NAT'L L.J., Sept. 29, 2003, at 17; Gary Young, *Parts of Fla. Opinion Are a Bit Familiar*, NAT'L L.J., Aug. 18-25, 2003, at 1. The case was *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *approved in part, vacated in part*, 945 So. 2d 1246 (Fla. 2006).

103. See K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32 COLO. LAW. 53, 53 (2003).

104. See *id.* ("Our precedent-based system emphasizes consistency over originality and bases ideas on those of others in the past.").

The client usually evaluates the practicing attorney by whether the client's goals are accomplished and not on the basis of the originality of the attorney's work product. Practicing attorneys customarily borrow from the writing of others, especially for transactional documents; in fact, it is fairly rare for an attorney to produce wholly original writing.¹⁰⁵ An approach requiring originality would be needlessly time intensive and, therefore, expensive. It might also be counter-productive, as identical language among transactional documents is more likely to be interpreted consistently.¹⁰⁶ This extends to litigation, where an attorney may borrow language from a document that "worked" for another attorney in another case.¹⁰⁷ As a result, attorneys often use formbooks or earlier documents based on forms to create the draft of a document.¹⁰⁸ In the practice of law, copying is the norm in certain types of writing, perhaps followed by varying degrees of customization.¹⁰⁹ Forms serve the purpose of providing expertise and a shortcut for practitioners and are either explicitly or implicitly available for copying in drafting a document, with the final document perhaps incorporating language from the form word for word.¹¹⁰

Because of the customary use of forms and reuse of client materials, plagiarism claims rarely have been leveled against practicing attorneys, despite the fact that much of their writing is not original. However, such claims are not unknown. A practicing attorney may be susceptible to plagiarism and copyright claims if the attorney borrows from copyrighted works or misrepresents the work product as being original. Although rare, plagiarism allegations provided the basis for disciplinary actions against several licensed attorneys. For instance, an Iowa attorney was

105. *See id.*

106. *See id.* ("One reason legal language is reminiscent of early English is because attorneys repeat wording verbatim, time after time, to avoid inconsistency or variation in interpretations.").

107. *See id.*

108. *Id.* ("Practitioners frequently borrow legal forms. . . . Several practice books also are premised on the expectation that lawyers will borrow their forms Lawyers frequently pick and choose language from these formbooks and include them in their documents, without attribution to the source.").

109. *See id.* at 54. Customization entails using a form or previously drafted document as the starting point for a new document, tailoring it for the new client's purposes. *See id.* If the matters are similar, two client documents may be identical or very similar in wording when they are completed. Attorneys develop expertise in certain matters, and many are specialists. While these attorneys often charge higher rates, clients benefit because the attorney has likely seen identical or similar matters. Such an attorney already has an effective approach for handling the matters, including written materials used in earlier cases. *See id.* ("The client has nothing to gain from paying an attorney to start from scratch with each new document. By using these sources, attorneys can pass on the time savings to clients.").

110. *See id.* at 53-54.

suspended for six months for plagiarizing eighteen pages of a treatise in a post-trial brief.¹¹¹ Similarly, though not with regard to practice documents, the Illinois Supreme Court and the District of Columbia Court of Appeals censured an attorney for plagiarizing twenty-three pages of an article in a treatise chapter,¹¹² and a New York court censured an attorney for submitting two writing samples as his own when they were not.¹¹³ In those cases, the outrageousness of the attorney's behavior justified the discipline, but less flagrant "customary" copying might be overlooked.

Though copying another attorney's work product may not always be plagiarism, an interesting question is whether it constitutes copyright infringement.¹¹⁴ An attorney may be tempted to claim copyright infringement where substantial amounts of time were spent drafting a complaint, only to see that another attorney copied it, passed it as her own, and used it in another lawsuit. The result would depend on whether pleadings are protected by copyright. Complicating potential claims for copyright infringement is the question of whether the infringed document was original or itself used a document authored by another as a starting point.¹¹⁵ In law firms, one would need to consider who owns the copyright in a document. The answer may differ depending on whether it was written by an associate or a partner.¹¹⁶

While this discussion is mostly conjecture, a large New York City law firm apparently believes that pleadings can be copyrighted. The law firm threatened to file suit for copyright infringement, claiming that other attorneys had copied the firm's pleadings.¹¹⁷ In 2002, the firm sent cease-and-desist letters to approximately ten firms, demanding that the firms stop copying and using the New York City firm's pleadings.¹¹⁸ Even if portions of pleadings are copyrightable, some argue that use of those

111. Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 300, 302 (Iowa 2002).

112. *In re Hinden*, 654 A.2d 864, 865 (D.C. 1995) (per curiam).

113. *In re Steinberg*, 620 N.Y.S.2d 345, 346 (N.Y. App. Div. 1994) (per curiam).

114. See Stanley F. Birch, Jr., *Copyright Protection for Attorney Work Product: Practical and Ethical Considerations*, 10 J. INTELL. PROP. L. 255, 256-57 (2003) (citing MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.18[E] (2002)).

115. One who refines a pre-existing document can have a copyright in the new portions of the document but not in the pre-existing material. *Id.* at 258 (citing 17 U.S.C. § 103(b) (2000)).

116. The work of the associate, as work-for-hire, is probably owned by the law firm. Ownership of the document written by the partner may depend on the relationship between the partner and the law firm. *Id.* at 259-61.

117. Janet L. Conley, *Firm Claims Its Words are Stolen*, NAT'L L.J., Nov. 25, 2002, at A21; see also DuVivier, *supra* note 103, at 53.

118. Conley, *supra* note 117.

portions falls within the fair use exception.¹¹⁹ Borrowing from another's transactional and litigation documents without identifying the source of the writing, a customary practice for practicing attorneys, is currently a gray area in legal scholarship, though it potentially raises important legal and ethical issues.

D. Plagiarism and the Bar Applicant

In a few cases, a plagiarism standard requiring original writing affected a law graduate's admission to practice law. The Georgia Bar refused to certify fitness of one applicant to practice law, in part because of his plagiarism of a law school paper.¹²⁰ Similarly, a South Dakota Bar applicant was denied admission for plagiarizing six pages in his law review case note from another law review article and submitting a take-home final exam that was partially identical to that of another student.¹²¹ In another case, a New York attorney was censured for failing to state in his bar admission application that an LL.M. program had dismissed him for plagiarism.¹²² Though bar applicants seem to receive extra scrutiny with regard to plagiarism accusations, it is rare for bar associations to deny a license to practice law to an applicant who committed plagiarism while in school.¹²³ One could argue that students should not be held to higher standards than practitioners and that denying an applicant admission to practice is a much more severe penalty than would be meted out to a practitioner for similar conduct.

The following table summarizes some of the considerations involving plagiarism by attorneys, depending on their role in the legal profession, and plagiarism by bar applicants.

119. See, e.g., David M. Young, *Can the Lawsuit Industry Copyright Its Class Action Complaints?*, TOXIC CHEMICALS LITIG. REP., Nov. 13, 2003, at 11, 12-13.

120. *In re K.S.L.*, 495 S.E.2d 276, 277-78 (Ga. 1998) (per curiam).

121. *In re Widdison*, 539 N.W.2d 671, 672-73 & n.2 (S.D. 1995).

122. *In re Harper*, 645 N.Y.S.2d 846, 847-48 (N.Y. App. Div. 1996) (per curiam).

123. See, e.g., *In re Zbiegien*, 433 N.W.2d 871, 877 (Minn. 1988) (per curiam) (holding that a student's one-time incidence of plagiarism should not result in a denial of bar admission); see also Richard L. Sloane, Note, *Barbarian at the Gates: Revising the Case of Matthew F. Hale to Reaffirm that Character and Fitness Evaluations Appropriately Preclude Racists from the Practice of Law*, 15 GEO. J. LEGAL ETHICS 397, 416 n.78 (2002) (listing plagiarism as an example of conduct that is "significant but not decisive" in determining bar admission).

Copying By Attorney Groups

	Professors	Judges	Practitioners	Bar Applicants
Expectations	Original scholarship	Apply precedent; decide cases and provide rationale	Pursue client interests	Original scholarship
Potential injured parties	University, original author, co-author, other professors, funding agency	Law-clerk, attorney author, non-prevailing party	Original author, law firm of original author	Institution, original author
Issues	What should the standard be for teaching materials?	Does copying compromise independent judgment?	What should the standard be for transactional documents?	Should the standard be higher than the standard for practitioners?
Sanctions	None to severe, penalties for copyright infringement	None, reversal on appeal, adverse publicity	Cease and desist, penalties for copyright infringement	Denial of bar admission, censure

III. ANALYSIS AND RECOMMENDATIONS

A. Developing Standards

There are a number of issues concerning the application of the concept of plagiarism to legal writing. First, there is confusion, or at least a lack of consensus, as to what is necessary before copying may be considered plagiarism.¹²⁴ As a result of this confusion, the concept of plagiarism is not applied on a consistent basis. While there have been many instances of plagiarism allegations in academe, including at law schools, complaints against practitioners and judges are rare.¹²⁵ This is so even though it is very common for practicing attorneys to copy another attorney's work and somewhat routine for judges to copy from documents submitted in the case. Even in academia, there are many unresolved questions relating to republication of previously published work, the authorship of work contributed by student and graduate assistants, and lack of consistent sanctions.

What should the plagiarism standard be in the age of information sharing? One possible response would be to lower the ethical standard in light of the ease of copying. The widespread belief among those who grew up with the Internet, that information that is available can be freely used, represents a major divide between people "out in the real world" and traditional academic culture. Many students, lay people, and even

124. See discussion *supra* Part I.

125. See discussion *supra* Part II.A-C.

some lawyers have difficulty understanding the concepts of plagiarism and copyright. Because of this lack of understanding, or because of convenience or greed, many people are quite resistant to complying with plagiarism standards.

However, if ethics standards were allowed to reflect the cut-and-paste mentality of many users, it would be impossible to provide any protection for authorship. Loosening the plagiarism standard to a level that complies with common “copying” practices would likely obliterate the standard entirely. The ease with which writing can be copied and pasted is not an excuse for abandoning the ethical principle underlying plagiarism: that it is wrong to steal someone’s writing, fail to credit the original authors, and gain an undeserved competitive advantage. However, there is certainly room to clarify what plagiarism is and, at the same time, to develop a realistic view about the permissibility of copying, depending on the circumstances involved.¹²⁶

After considering the varying practices within the legal profession,¹²⁷ the authors believe that the definition of what constitutes plagiarism must be refined. The authors provide the following definition as a starting point: intentional or unintentional misappropriation of another’s words as one’s own without acknowledging the contribution or source while being credited with something undeserved. Earlier sections of this

126. Two related issues outside the scope of this article are determining what sanctions should be imposed for plagiarism and which entity should impose them. As described above, the definitions of plagiarism adopted by educational institutions, professional organizations, journals and university presses are inconsistent; therefore sanctions against professors and attorneys for committing plagiarism are similarly inconsistent. Sanctions at an educational institution can include discharge or suspension with or without salary reduction, stripping of special appointments or titles, and limiting institutional responsibilities. See David Glenn, *The Price of Plagiarism*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 17, 2004, at A17. Sanctions against practicing attorneys can include license revocation or suspension, a public reprimand, and expulsion from professional organizations. See *id.* Sanctions imposed by an academic journal can include publishing the findings of plagiarism in the journal, eliminating the article containing the plagiarism from electronic databases, and refusing further submissions from the plagiarist. *Id.*; see also Glenn, *supra* note 68. For sanctions imposed by the ORI, see *supra* notes 45, 77 and accompanying text. The plagiarism standards and sanctions of educational institutions, journals, publishing companies, and professional organizations may be inconsistent or inadequate. Thus, it behooves those entities to review their standards and educate individuals within their jurisdictions on plagiarism and copyright infringement.

Once plagiarism is discovered, who should discipline the plagiarist? In part, it depends on the status of the plagiarist. If the plagiarist is a professor, the academic institution may discipline the plagiarist. See Glenn, *supra*. If the plagiarist is a practicing attorney, the attorney may face disciplinary action by the bar association. See *id.* If the plagiarist is an author, the journal or publishing company may impose disciplinary sanctions. See *id.* In addition, the author may face adverse publicity or other professional sanctions.

127. See *supra* Part I.A (discussing four existing definitions of plagiarism).

article identified various concerns regarding how to define plagiarism.¹²⁸ Each attorney group must honestly consider what is and what is not acceptable and reach a consensus on what standards should apply to the group. This will result in more clarity as to acceptable practices and some practices that were previously common may be condemned.¹²⁹ The authors believe that if the line is more clearly drawn, compliance will increase.

One recommendation for all attorney groups is to cite all language that is being reused and to use quotation marks wherever wording is copied, unless the writer is certain that there is an exception. A related recommendation is that authorship should accurately reflect those who have made significant contributions to the publication, and others who have contributed less substantially should be named as contributors. Citing to the author who originated the words or ideas reinforces the appearance that the new writing is authoritative and provides a broader base for ideas raised in the document. An author's reputation is partly based on the frequency with which his work is cited, the identity of the citing author, and the journal in which that citation appears, with the more authoritative authors cited more often and in more highly respected outlets.¹³⁰ Citing to the original author's work is a form of compensation to that author because acknowledging her as an authority enhances her reputation.

While most lawyers are aware of the meaning of plagiarism, application of the principle seems to reflect the context in which the writing is done. For professors, who are expected to publish original scholarship, plagiarism is equivalent to misrepresentation and, if intentional or reckless, equivalent to fraud.¹³¹ There may be an exception to the requirement of original scholarship for teaching documents;

128. Current "gray areas" of plagiarism make it difficult to determine what should and should not be included in the definition of the term. See *supra* notes 31-41 and accompanying text (republishing); *supra* notes 42-47 and accompanying text (naming authors and contributors); *supra* notes 84-119 and accompanying text (teaching materials, judicial opinions, and transactional or litigation documents).

129. See *supra* notes 31-40 and accompanying text (discussing reuse of one's own previously published work and noting that there is little consensus regarding if or when the practice is acceptable); *supra* Part II.D tbl. (outlining the differences between current plagiarism practices in each attorney group).

130. One of the indicia for the quality of a particular journal is the number of times it is cited, which is easily accessed through Washington and Lee University's web-based guide to legal publications for recent years. See *supra* note 63.

131. See AM. ASS'N OF UNIV. PROFESSORS, *Statement on Plagiarism*, in POLICY DOCUMENTS & REPORTS 109, 109-10 (1995) ("[Plagiarism] is theft of a special kind, for the true author still retains the original ideas and words, yet they are diminished as that author's property and a fraud is committed upon the audience that believes those ideas and words originated with the deceiver.").

however, this exception is implicit at best and may violate copyright law. As such, professors should request permission to use copyrighted teaching materials.

Judges encounter potential problems with plagiarism when they take shortcuts in drafting opinions and other rulings. It may be prudent for the judiciary to consider including the names of all “authors” of an opinion¹³² and even to disclose the source of any material copied from the attorneys.¹³³ Such disclosure would not affect the work of the judge but would clarify and divulge what many people already realize — that judges do not solely author their opinions, but rather work as part of a team over which they retain final decision-making authority.

Because originality is not the goal of practicing attorneys when drafting transactional documents and pleadings, a lower standard of originality may be appropriate in this context. However, a practicing attorney should not be excused if he or she borrows from a copyrighted work. Additionally, even with transactional documents and pleadings, an argument can be made that the clients have the right to know the source of the attorney’s work. Therefore, in the future, the plagiarism standard for practitioners should move closer to that for original scholarship. Though documents produced by judges and attorneys have not been subjected to an originality standard in the past, except in rare instances, this may be changing. One must give credit to the original author when borrowing language or run the risk of being labeled a plagiarist. Although the risk is slight, the consequences are serious.

B. Prior Publications

Intellectual honesty requires full disclosure. Whether the legal writer should avoid borrowing language from his own prior work depends on whether there is an expectation that each publication will be original. It can be argued that a professor who borrows language from a previous publication perpetrates a fraud on the educational institution, the entity publishing the subsequent work, and the reader.¹³⁴ Such reuse, however, is common practice and may be consistent with further development of a particular line of study. The authors’ position is that legal scholars should avoid producing duplicate or redundant publications, unless there is full disclosure. Reuse of short passages is not as objectionable but is not recommended. With even minor reuse, doubt is cast on the

132. Perhaps law clerks would be considered “contributors” rather than authors, as is the case with scientific writing. *See supra* notes 45-47 and accompanying text.

133. This is consistent with general rules of attribution required by most plagiarism definitions. *See supra* Part I.D.

134. *See* discussion *supra* Part I.C. Additionally, the author may be infringing on a copyright. *See supra* Part I.E.

originality of the author's entire portfolio of publications.¹³⁵ A better practice is to write offensively by disclosing the existence of previously published articles on the same subject and by refraining from copying even a small amount from a previous publication.

C. Authorship

Accurately reflecting the authorship of a publication includes avoiding guest, gift, honorary, and ghost authors.¹³⁶ A person in a position of power must resist the temptation to take advantage of subordinates by pressuring them to write under her name.¹³⁷ In any relationship of this type, where the potential for the abuse of one's position exists, the person in power has the opportunity and the temptation to borrow the writing of the subordinate. This practice should be eliminated.

While plagiarism standards are comparatively firm in academe, there must be greater clarity as to when professors may incorporate student writing into a document. At a minimum, the professor should secure the student's written consent for the use of the student's language and, of course, that consent must be freely given. Professors should request the student's consent only after grading is finished so the student does not feel pressured to agree. Professors should never use student writing without the student's permission, should always acknowledge the contribution, and should name the student as a co-author whenever the

135. For an example of an academic institution committee investigating self-plagiarism allegations, see Scanlon, *supra* note 31, at 1. The author served on a committee charged with investigating self-plagiarism allegations against two co-authors of two articles. The two articles at issue were based on the results of a single survey, with each article based on a separate portion of the results. Although the data was distinct, portions of other sections of the articles — including the introduction, the literature review, the survey description, and the research methods employed — were substantially similar, if not identical. *Id.* Although the committee did not find misconduct, *id.*, presumably the plagiarism allegations came to the knowledge of the academic community and clouded the co-authors' reputation.

Self-plagiarism and copyright infringement can become more complicated with articles by multiple authors, especially where less than all of the authors are the same over the course of several articles. Imagine that Author A and Author B publish Article One; later, Author A borrows from Article One (without citing to Article One) when writing a manuscript published with Author C as Article Two. The publication of Article Two involves plagiarism and copyright infringement, at least with respect to Author C.

136. See discussion *supra* Part I.D.

137. See *supra* Part I.D.; see also *supra* Part II (discussing various power relationships that can lead to plagiarism, such as professor and student, judge and attorney, judge and law clerk, and law firm partner and associate).

student wrote part of the article. Academic institutions should develop processes for obtaining voluntary written consent from students.¹³⁸

A related issue is whether a professor should give credit for student research that is incorporated into the final document. Is an acknowledgement of the research contribution sufficient or should the student be considered an author? Another issue arises when a student develops a publishable manuscript as part of coursework and the professor demands sole or joint authorship, even though the professor's contribution was minimal. A standard for authorship and a practice of naming those who contributed significantly less as contributors would alleviate some of these problems. Academic institutions should have a process in place to deal with these situations and adjudicate them when they arise. The authors suggest that academic legal scholars adopt the following authorship standard, with any others contributors identified in an acknowledgement section. A person should be named as author only if:

1. The person was instrumental in the formulation of the substantive content of the article;
2. The person substantially participated in the writing of the substantive content of the article; and
3. The person reviewed the article as published and agreed to be named as an author.¹³⁹

This standard would eliminate guest, gift, and honorary authors and would provide guidance on how to deal with student-authored writing and student assistants. Under the above standard, students who made an integral intellectual contribution to an article would be named as authors; other students who performed research or contributed to writing or revising of an article, but not in a meaningful way, would be named in the acknowledgment section as contributors.

D. Negligent Plagiarism

One thorny problem is the fact that much plagiarism is explained away as accidental or negligent. Some definitions of plagiarism do not include unintentional copying. The authors take the position that unintentional plagiarism should not be treated differently from intentional plagiarism, if the plagiarism is material. Universities, professional organizations, law reviews, journals, and other publishers should adopt a definition of

138. Because of the temptation for abuse by professors, perhaps the professor should bear the burden of proof in the event a student accuses the professor of plagiarizing the student's writing.

139. The authorship standard is based on the authorship standard of the ICMJE. *See* INT'L COMM. OF MED. JOURNAL EDITORS, *supra* note 46; *see also supra* notes 46-47 and accompanying text.

plagiarism that clearly includes both intentional and unintentional plagiarism. While awarding punitive damages will only be appropriate where there is intent, even negligent plagiarism can cause injury and therefore provide the basis for compensatory damages. A successful defense based on lack of intent encourages others to raise the same defense; in addition, it is self-serving and raises doubts as to whether the author was as innocent as claimed. Thus, even an unintentional misrepresentation should be actionable.

E. Plagiarism Detection Technology

Besides providing the ethical approach to writing, citing to the original author protects against embarrassment. In the past, print works were much less accessible, and a great deal of plagiarism was identified only by accident, usually by a knowledgeable reader who noticed similarity. However, advances in technology make it easier and far less time consuming to detect plagiarism. The capability to electronically screen a work for plagiarism already exists through databases such as turnitin.com,¹⁴⁰ though these databases are mostly being applied to student work. Today's legal scholarship should be produced with the possibility of electronic screening in mind.

Also, advances in technology are making it easier to scan works currently available only in print in order to convert them into digital form.¹⁴¹ It is not entirely unlikely that a disgruntled student might accuse a professor of plagiarism after searching the professor's output for "problems." The same could happen to a practitioner with a disgruntled client. Someone with a vindictive, retaliatory, or recreational motive might target an attorney's publications to discover instances of plagiarism and then launch an offensive campaign to discredit the attorney and her employer. If plagiarism is identified, allegations could be publicized

140. See *supra* note 3.

141. In fact, Google, a pioneer in data searching, is now scanning the collections of several major libraries to produce a digital card catalog that will provide researchers "information about the book, and in many cases, a few snippets—a few sentences showing your search term in context." Google Book Search Library Project, <http://books.google.com/googleprint/library.html> (last visited Mar. 21, 2008). For books where the author has granted permission, Google will make a "Limited Preview" available, and for books that are in the public domain, Google will supply a "Full View." Google Book Search, <http://books.google.com/googleprint/screenshots.html> (last visited Mar. 21, 2008). Easy links to online bookstores will also be available. *Id.* While it is unclear whether Google's enterprise will extend to journals, where most legal scholarship is published, most journals are already available online through the LexisNexis and Westlaw databases. Therefore, vast electronic databases against which an author's work can be compared already exist and are in the process of further expansion.

against the offending professor on a blog, website, or through emails.¹⁴² Further, copycats make the prospect of reprisal even more plausible.

Authors should have a strategy to preempt retaliatory action. If the effort to protect against plagiarism allegations is manageable, it would be foolish not to take appropriate preemptive action. Enclosing quoted passages in quotation marks and citing to the source of the passages are nearly painless methods of protecting oneself against claims of the most blatant types of plagiarism. In addition, institutions receiving federal funding must have research misconduct policies relating to plagiarism, falsification, and fabrication by employees. These policies should require a formalized process for an internal inquiry and response when allegations are made.

Further, it is possible to spot some problems by using plagiarism detection software. Journals and those reviewing conference submissions are beginning to routinely use computer programs to identify plagiarism and self-plagiarism among professors.¹⁴³ Although technology has made it much easier to plagiarize, technology has also made plagiarism much easier to detect. It is foreseeable that academic institutions may someday require employees to screen manuscripts prior to submission for publication to avoid plagiarism allegations and that promotion and tenure committees might also use screening tools as part of the employee's evaluation.

The following is a table of recommendations:

Recommendations for Plagiarism Standards by Legal Writers

Plagiarism standard	Should be clearly set and publicized
Intent to plagiarize	Should not be required for imposing sanctions, but lack of intent can limit sanctions (negligent plagiarism)
Acceptable practices for copying in teaching materials, judicial opinions, practitioner documents	Should be defined
What constitutes a publication	Should be defined
Borrowing from one's prior publication	Should be disclosed
Authorship	Should reflect a substantial contribution
Naming as contributor	Should reflect something less than authorship
Plagiarism detection technology	Should be used

142. A student with a grudge might find it intriguing to humble a professor and embarrass the university and might not fear liability for defamation. RateMyProfessors.com has already proved popular with students for posting reviews of professors available for viewing by other students. See Rate My Professors, About Us, <http://ratemyprofessors.com/About.jsp> (last visited Mar. 21, 2008) ("RateMyProfessors.com is the Internet's largest listing of collegiate professor ratings, with more than 6.8 million student-generated ratings of over 1 million professors.").

143. Carlson, *supra* note 41.

IV. CONCLUSION

Legal scholarship should be guided by intellectual honesty to avoid offense and to provide a realistic picture of the sources of work products. Honesty provides the necessary moral underpinnings, but courtesy and commonly accepted social standards are also relevant. The age of information sharing signals the need for greater attention to setting standards for intellectual honesty through a clarification of the concept of plagiarism because copyright law cannot carry the burden alone. Instead, there is an urgent need to more clearly define the plagiarism standards for legal scholarship. The best way to accomplish this objective would be to begin with the authors' definition and open a dialog to determine acceptable and unacceptable practices.

More education is also needed. At first blush, plagiarism seems to be a concept that is easy to understand; however, it is actually quite complex. Its definition, as well as the sanctions for those engaged in the activity, differ depending on the type of writing and the position of the author. Universities, professional organizations, law reviews, journals, and publishers should clearly define plagiarism to include negligent as well as intentional plagiarism, delineate what constitutes a prior publication, and clarify when use of text from a previously published document is acceptable. Authorship standards need to be adopted so that the persons named as authors accurately reflect the persons who made significant contributions to the writing, with others, who made lesser contributions, identified as contributors.

The age of information sharing facilitates the temptation to plagiarize because of the widespread availability of information in digital form and the ease with which the information can be copied and pasted into another document. Sometimes social norms change as technology evolves, but the ease with which plagiarism can be accomplished should not be an excuse for avoiding an obligation to produce original scholarship and to properly attribute sources.

